

yet another round of briefing, during which the aging witnesses will celebrate yet another birthday.

Designation for hearing will deprive Ogden of no process to which it is due. While the Commission's discretion not to hold a hearing is subject to review on an abuse of discretion standard, the Commission's discretion to hold a hearing is nearly unreviewable. See Atlantic Broadcasting, 5 FCC2d 717 (1966) (since a hearing designation order is interlocutory, reconsideration of such an order will not be had absent truly extraordinary circumstances.) A hearing is not in and of itself a sanction; it is simply a procedure used to develop a full record. Ogden will and should have every opportunity to appear at the hearing and make its case for renewal.<sup>17/</sup>

**II. THIS COURT SHOULD RETAIN JURISDICTION  
DURING HEARING PROCEEDINGS ON REMAND**

The Commission does not seek dismissal of the appeal, but wishes instead that the appeal be held in abeyance. See Motion at 3 (promising to file periodic status reports). However, Appellants note that the relief they requested in their appeal -- designation of the case for hearing -- is also the appropriate outcome of this Court's disposition of the Commission's Motion for Remand. Consequently, if the case is set for trial, the Commission could argue that the appeal has been mooted and is subject to dismissal.

Under the extraordinary circumstances presented here, this Court should anticipate such a dismissal request and manifest its intention, through the designated panel, to retain jurisdiction

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<sup>17/</sup> Appellants underscore that their procedural due process quarrel is solely with the Commission, not with Ogden. While Ogden stands accused of serious misconduct including misrepresentations to the Commission, Ogden's procedural filings have been presented with dignity, and its counsel's conduct has been completely above reproach.

throughout all of the proceedings below and upon any further appeals. The underlying deficiencies in the FCC decisions thus far -- including serious errors not acknowledged in the Commission's candid but very limited Motion -- could continue to infect the Commission's disposition of this case on appeal. A crabbed hearing designation order, an inadequate hearing,<sup>18/</sup> or a poorly thought out Commission decision to award renewal upon review of the ALJ's initial decision would force Appellants to return to this court a second time. There Appellants would be compelled to brief again many of the issues then have already briefed.

Retention of jurisdiction during the remand period will have at least three advantages.

First, it would underscore for the Commission the importance of affording full procedural due process. The continuing oversight of this Court will protect the due process rights of Appellants and the Intervenor, each of whom is entitled to a full hearing.

Second, retention of jurisdiction will save time. After trial, the NAACP or Ogden would be able to bypass docketing and immediately brief the matter in this Court. The NAACP would be able to do so by supplementing its brief already on file.

Third, the designated panel of this Court has the advantage of being already familiar with the record. The panel would continue to exercise this Court's jurisdiction if the case is not dismissed.

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<sup>18/</sup> A not irrational fear. UCC I, supra; UCC II, supra.


CONCLUSION

WHEREFORE, this Court should remand the record with instructions to designate this case for hearing. This Court, through the designated panel, should retain jurisdiction during the proceedings below, and should provide guidance to insure fair and expeditious handling of the case at trial. See p. 15 supra.

In the alternative, Appellants respectfully request that the Motion be denied, and that this case be briefed and argued as scheduled.

Appellants lack the resources to petition for a writ of mandamus every time the FCC violates procedural due process. Consequently, this Court may wish to schedule oral argument on the Commission's Motion, in order to obtain from the Commission's representatives an explanation for the pattern of procedural abuse in this case and others. See n. 8 supra.

Respectfully submitted,<sup>19/</sup>

  
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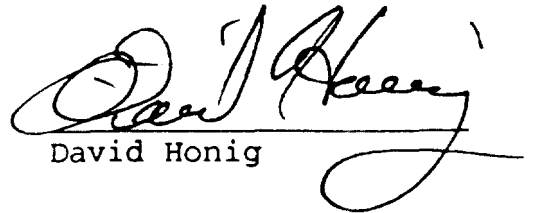
<sup>19/</sup> This Partial Opposition is being filed one day out of time with a consent motion for leave.

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 2nd day of June, 1993 caused a copy of the foregoing "Partial Opposition on Motion for Remand of Record, and Motion to Require Designation for Hearing" to be delivered by U.S. First Class Mail, Postage Prepaid, to the following:

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